INDEX

	Page
Reference to Opinions in Courts Below	1
Jurisdiction of the Supreme Court of the United States	2
Question Presented for Review	2
Constitutional Provisions	3
Statement of the Case	3
Argument	11
Appendix A, Opinion of the Colorado Supreme Court	16
Appendix B, Judgment of the Arapahoe County District Court	23
Appendix C, Notification of Denial of Petition for Rehearing	29
Appendix D, Respondent's Trial Exhibit No. 1	31

TABLE OF CASES

Brock v. State Highway Commission, 195 Kan. 361, 404 P.2d 934	14
City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789	12
Lavelle v. Town of Julesburg, 49 Colo. 290, 112 Pac. 774	14
Minnequa Lumber Co. v. City and County of Denver, 67 Colo. 472, 186 Pac. 539	12
Nichols v. Commonwealth, 331 Mass. 581, 121 N.E.2d 56	14
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393	14
People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799	14
Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166	14
Radinsky v. City and County of Denver, 159 Colo. 134, 410 P.2d 644	13
Sauer v. City of New York, 206 U.S. 536	12
U.S. v. Pope & Talbot, Inc., 293 F.2d 822	14

IN THE

Supreme Court of the United States

No. .....

ROBERT HAYUTIN,

Petitioner,

VS.

COLORADO STATE DEPARTMENT
OF HIGHWAYS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered in case number 23605.

REFERENCE TO OPINIONS IN COURTS BELOW

The decision of the Colorado Supreme Court has not yet been officially published. However, it has been published in the National Reporter System at 485 P.2d 896 (1971); it is included herein as Appendix A.

The decision of the District Court, County of Arapahoe, Colorado, in Civil Action No. 25746, was neither officially nor unofficially reported; it is included herein as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Supreme Court of the State of Colorado was entered on June 7, 1971. Petitioner's Petition for Rehearing was denied on June 28, 1971. A copy of the letter from the Clerk of the Colorado Supreme Court giving notification of such denial is included herein as Appendix C.

Jurisdiction of this Court is founded on 28 U.S.C. §1257(3), Petitioner having asserted below and asserting here deprivation of rights secured by the United States Constitution.

QUESTION PRESENTED FOR REVIEW

Petitioner is the owner of a tract of land in Arapahoe County, Colorado. Respondent is a department of the State of Colorado. In connection with a construction project on State Highway 70, a predecessor in title to Petitioner's tract conveyed a portion of the tract to Respondent. The contract between Petitioner's predecessor and Respondent provided for "three 40 foot wide openings in the right-of-way line adjacent to the subject property." In 1967, twelve years after the conveyance to Respondent and after Petitioner's acquisition of the tract, Respondent constructed a "traffic island", using part of the land previously conveyed by Petitioner's predecessor in title. The following table shows ingress to and egress from Petitioner's land prior to and after the 1967 construction of the "traffic island":

Ingress to property prior to construction	*after construction*
from State Highway 83 northwest-bound	available
from State Highway 83 southeast-bound	destroyed

from State Highway 70 northbound	destroyed
from State Highway 70 southbound	destroyed
Egress from property prior to construction	*after construction*
to State Highway 83 northwest-bound	available
to State Highway 83 southeast-bound	destroyed
to State Highway 70 northbound	available
to State Highway 70 southbound	destroyed

Does this severe limitation of access, including the complete destruction of ingress to Petitioner's abutting property from State Highway 70, and the resulting diminution of the value of Petitioner's land constitute a compensable taking of private property for a public use?

CONSTITUTIONAL PROVISIONS

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

It also involves Article II, Section 15, of the Constitution of Colorado: "Private property shall not be taken or damaged, for public or private use, without just compensation. . . ." This section is published in 1 Colorado Revised Statutes 1963, page 77 (1970 Revision).

STATEMENT OF THE CASE

This proceeding concerns a parcel of land located at the intersection of State Highway 70 (Havana Street) and State Highway 83 (Parker Road) in Arapahoe County, Colo-

rado. At the time the action was commenced, May 5, 1967, and since then, the parcel was owned by Petitioner. Respondent's trial Exhibit 1 is a drawing of the location; it is included herein as Appendix D. The pink areas were contructed by Respondent in 1955 and 1956; the green areas were constructed in 1967. The area enclosed by the heavy black lines is Petitioner's land. The blue area was conveyed to Respondent by Petitioner's predecessor in title in 1955. The legal description of the parcel shows that, prior to the 1955 conveyance, it abutted State Highway 70 (Havana).

On August 3, 1955, Respondent and Petitioner's predecessor in title, Raymond Near, entered into a written agreement for the purchase and sale of a parcel of land. That parcel, the area in blue on Exhibit No. 1, was conveyed by Near to Respondent by special warranty deed on October 7, 1955. The agreement provided that it was binding on the successors and assigns of the parties. The agreement further provided as follows: "The Department hereby agrees to provide three 40 foot wide openings in the right-of-way line adjacent to the subject property. . . ." The locations of the openings were given; one was to be at the north property line. In the upper right hand corner of the agreement the following appeared:

> PROJECT NO. S 0055(2)
> LOCATION Havana St. Hampden Ave.
> PARCEL NO. 23
> STATE HWY. NO. 70 COUNTY Arapahoe

Thereafter in 1955-6 the Respondent constructed certain improvements in the area; these are shown in pink on Exhibit No. 1. After this construction, Petitioner purchased the land.

In 1967 Respondent proposed to construct those improvements which appear in green on Exhibit No. 1. A civil action

was then commenced in the District Court of the County of Arapahoe on May 5, 1967. The action was commenced in the name of the Aberdeen Land Company, a Colorado corporation. At the trial, Petitioner, Robert Hayutin was substituted as party plaintiff. Hayutin and Aberdeen Land Company are referred to in this Petition interchangeably as "Petitioner". After commencement of the civil action, the proposed construction was accomplished.

As can be seen from Exhibit No. 1, prior to the 1967 construction ingress to Petitioner's property was available from State Highway 70 northbound and southbound; ingress was also available from State Highway 83 northwest-bound and southeast-bound. Egress from the property was available to the same lanes of the two highways. After the 1967 construction of the large island opposite Petitioner's property, ingress from State Highway 70 was totally destroyed, as was ingress from the southeast-bound lane of State Highway 83. Egress from the property is now available only to the northbound lane of State Highway 70 and the northwest-bound lane of State Highway 83.

Petitioner's Complaint set forth five claims for relief. The First Claim for Relief alleged that at least one of the three openings reserved in the agreement between Near and Respondent was direct access to State Highway 70. The Second Claim for Relief states that Petitioner, Respondent and Near by their acts showed that the agreement of 1955 grants an easement from Petitioner's land across the right-of-way, and that in reliance on the easement, Petitioner purchased the land and expended time and money to re-zone it; that Petitioner has a purchaser for the property subject to reasonable access to State Highway 70. Respondent is estopped to deny the existence of the easement. The Third Claim for Relief asked rescission or cancellation of the deed based on oral misrepresentations of an agent of Respon-

dent. The relief sought on the first three claims was a judgment declaring that the agreement of August 3, 1955, grants Petitioner the right of access to State Highways 70 and 83, or that the agreement grants Petitioner an easement across the land conveyed, or that the deed is cancelled or rescinded. The court was further requested to order that Respondent must proceed to condemn Petitioner's land or cease interference with Petitioner's property rights.

The Fourth and Fifth Claims for Relief alleged that Respondent's acts constituted a taking and a damaging, respectively, of private property without just compensation. These claims asserted that the value of Petitioner's land had decreased from $200,000 to $50,000, and asked damages in the amount of $150,000.

The Respondent filed its Answer on May 29, 1967. In addition to the general defense which denied the substantial allegations of the Complaint, the Respondent asserted two additional defenses. The first was that the Complaint failed to state a claim upon which relief could be granted; the second was that Near, Petitioner's predecessor in title, and Respondent resolved the matter of compensation for land acquisition and damages by their agreement of August 3, 1955, and that Petitioner was barred and estopped from asserting any claims.

Trial to the Court was held on October 16, 1967, before the Honorable Robert B. Lee. Since the trial Judge Lee was appointed to the Colorado Supreme Court, but did not participate in the proceedings in that court. Trial was on the First, Second and Third Claims for Relief; the amount of Petitioner's damages was reserved for hearing after determination of Petitioner's right to compensation. After trial Petitioner filed his trial brief, which was followed by Respondent's brief and Petitioner's reply brief.

On March 29, 1968, Judge Lee entered his Findings of Fact, Conclusions of Law, Judgment and Decree; it is included herein as Appendix B.

The trial court found as fact that the Petitioner owned the described tract of land; that Petitioner's predecessor conveyed a strip of land to Respondent and such strip abuts Petitioner's land; that Respondent acquired the strip of land for the purpose of improving and widening Havana Street [State Highway 70] and Parker Road [State Highway 83]; that the agreement between Petitioner's predecessor and Respondent reserved three forty-foot wide openings in the right-of-way line, which line is the same as Petitioner's property line; that Respondent made certain improvements in 1955-6 and after completion of this construction access to Petitioner's property was found to be as follows:

> For traffic traveling south on Havana, left turn movements could be made into the property via the North opening; for traffic traveling north on Havana, a right turn movement could be made into the property via the North opening; for traffic traveling on Parker Road in an easterly direction, a left turn could be made into the property via the North opening; for traffic traveling in a westerly direction on Parker Road, right turn movements could be made into the property via all three openings. Access out of the property could be accomplished by making right and left turn movements from the opening at the North and right turn movements only from the other two openings.

The Court further found that in 1967 the Respondent made further improvements, without the necessity of acquiring additional right-of-way, at the intersection, including an island

in the public right-of-way, directly in front of and across from the north opening of Petitioner's tract; that the construction also included a right-turn lane between Petitioner's land and the island; that after the 1967 construction access was as follows:

> For traffic traveling in a southerly direction on Havana, which before could make a left turn via the North opening, now has to travel to the middle of the intersection, make a left turn on Parker Road, and travel from three-tenths to nine-tenths of a mile, depending on varying traffic conditions, and then retrace its movements and return on the North side of the Parker Road, from which road movements could be made into the property via all three openings; for traffic traveling in an easterly direction on Parker Road, which before could make a left turn into the property via the North opening, now has to travel three-tenths to nine-tenths of a mile beyond the intersection and return on the right side of Parker Road, from which right side of said road entrance to the property can be gained via all three openings. For traffic traveling north on Havana in a northerly direction, the right turn movement into the property via the North opening is now not available because of the construction of the island. Instead, a right turn would have to be made at the intersection and again traffic would have to move three-tenths to nine-tenths of a mile and return on the right side of Parker Road, from which road access can be gained into the property via all three openings. For traffic traveling on Parker Road in a westerly direction, a right turn can be made via all three openings as before.

On these findings the court concluded that the agreement between Petitioner's predecessor and Respondent reserved three openings in the right-of-way or property line as access easements to Petitioner's property, but did not reserve easements in the right-of-way as stated in Petitioner's First Claim; that Petitioner failed to prove that Respondent was estopped from denying the easements within the right-of-way as alleged in the Second Claim; that the evidence was insufficient to sustain the allegations of misrepresentation of the Third Claim; that the 1967 construction did not constitute a compensable taking or damaging; that the construction of the traffic island was within the police power of the state; that access to Petitioner's property is reasonable and was not substantially impaired; that Petitioner's injury is inconvenience and differs in degree, but not in kind, from that suffered by the public; that Petitioner has no right to the continued flow of traffic in front of his property; that Petitioner's recovery is barred and the claim for damages is damnum absque injuria and not compensable; and that Petitioner is not entitled to relief as prayed for.

The Judgment denied all five claims for relief.

On April 24, 1968, within the thirty-day period allowed by the court, Petitioner filed his Motion for New Trial, which was denied without comment on April 29,1968.

On Petitioner's Writ of Error in the Colorado Supreme Court, the judgment of the trial court was affirmed. In an opinion by Justice Edward C. Day, the Supreme Court held that the agreement between Petitioner's predecessor and Respondent called for the conveyance of a strip of land and for three forty-foot openings in the property line. The openings had been provided and had not been interfered with. The agreement was not ambiguous and not subject to variance by parol evidence. The opinion then affirmed the conclu-

sions below in regard to estoppel and misrepresentation. The third section of the opinion stated:

> Recent pronouncements by this court in the cases of *Thornton v. City of Colorado Springs*, ___ Colo. ___, 478 P.2d 665 (1970); *Majestic Heights Co. v. Board of County Commissioners of Jefferson County*, ___ Colo. ___, 476 P.2d 745 (1970), all announced subsequent to the filing of briefs in the instant case, have enunciated the rule that mere circuitry of route will not allow recovery for damage of property.

The opinion concluded that the Petitioner still had reasonable access to his property; access had not been substantially impaired; and that Petitioner's damage was different in degree not in kind from that of the general public.

Petitioner's Petition for Rehearing was filed on June 21, 1971, and was denied without comment on June 28, 1971.

Petitioner raised the federal question in his Complaint. Paragraph 5 of the Fourth Claim for Relief alleged: "That said action of the defendant [Respondent] constitutes taking private property without just compensation contrary to the United States and Colorado constitutions." (Record, Case Number 23605, Colorado Supreme Court, p. 8) Paragraph 5 of the Fifth Claim for Relief is identical to the above, except "damaging" is substituted for "taking". (Record, p. 9) The trial court, without specifically mentioning the United States Constitution, held that the claim for damages was not compensable. (Record, p. 65)

Petitioner re-asserted the federal question in paragraph 4 of his Motion for New Trial: "That this Honorable Court erred in not holding that the due process clauses of the Constitution of Colorado and of the United States afford pro-

tection to plaintiff [Petitioner]." (Record, p. 71) As stated above, the Motion for New Trial was denied without comment. (Record, p. 73)

Petitioner, as Plaintiff in Error in the Colorado Supreme Court, again raised the federal constitutional question in his Brief:

> SUMMARY OF ARGUMENT
>
> * * *
>
> D. That this Honorable Court [the trial court] erred in not holding that the due process clauses of the Constitution of Colorado and of the United States afford protection to Plaintiff [Petitioner]. (Record, Brief of Plaintiff in Error, p. 8)

The Colorado Supreme Court, without specifically mentioning the United States Constitution, held that the claim for damages was not compensable. (Record, Opinion of Colorado Supreme Court, p. 8)

ARGUMENT

In 1955 the subject property abutted both State Highways 70 and 83:

> . . . thence West 972.25' to the Northerly right-of-way line of State Highway No. 83, thence northwesterly along said right-of-way line 412.09' to the East line of South Havana Street [State Highway 70], thence North along said East line 109.93' to the point of beginning. (Appendix B, Findings of Fact 1 and 3.)

The strip of land conveyed by Near to Respondent included that portion of the parcel which abutted State Highway 70. The agreement of August 3, 1955, reserved one forty-foot wide opening at the north property line; in other words, at

the part of the property that abutted State Highway 70. There is nothing in the record to show that Respondent acquired Near's right of access, and the reservation in the agreement of August 3, 1955, clearly indicates the contrary. After the 1955-6 construction there was ingress to and egress from the subject property for both directions of traffic on both state highways; in particular, there was ingress to the property through the opening at the north property line from State Highway 70. Since the 1967 construction, it is impossible for traffic to move from State Highway 70 to the subject property. Ingress to the Petitioner's property from an abutting street has been destroyed, and this is the gravamen of Petitioner's case. Respondent has seized the access for a public use, and has not paid compensation.

Petitioner recognizes that this Court has long held that questions of local property law are to be determined by the courts of the states. *Sauer v. City of New York,* 206 U.S. 536 (1906). Colorado has held that access to an abutting street is a property right of a landowner. In the nineteenth-century case of *City of Pueblo v. Strait,* 20 Colo. 13, 36 Pac. 789 (1894), it is stated:

> Under these decisions, the plaintiff is entitled to recovery in this class of actions in cases where the damages suffered are different in kind from those suffered by the general public, while a recovery is denied for those damages common to all. And *when damages are occasioned an abutting owner by an improvement in the street in front of his property, whereby ingress and egress to the premises are injuriously affected, this is a kind of injury not common to the general public.* [Emphasis in original.]

Again in 1919, in *Minnequa Lumber Co. v. City and County of Denver,* 67 Colo. 472, 186 Pac. 539, Colorado recognized access as a property right:

> An abutting owner has an indefeasible right of access to and from his property to the street. 28 Cyc. 883. Such right is appurtenant to his lot and is private property. 15 Cyc. 665. As a general rule, this right cannot be taken away, or materially impaired or interfered with, even under legislative authority, without compensation. 13 R.C.L. 142, sec. 125.

Minnequa dealt with property that still had access to a second street, as is the case with Petitioner's property. As recently as 1966, the Colorado Supreme Court re-affirmed the principle:

> Generally, it can be stated that the owner of premises abutting on a highway has certain rights in and to the use of the public way distinct from the public's easement of passage. 25 Am. Jur. *Highways,* §152; 39 C.J.S., *Highways,* §141. And, damages occasioned such an owner in front of his land is [sic] not one suffered by the public and generally is compensable. [*Radinsky v. City and County of Denver,* 159 Colo. 134, 410 P.2d 644.]

Despite these clear statements of Colorado property law, the Colorado courts held that the destruction of access from State Highway 70 to Petitioner's property was not compensable. The decision in the present case applied to Petitioner, an abutting owner, the rule of damages applicable only to a non-abutting owner, holding that Petitioner's damage was different only in degree, not in kind from that of the general public.

The factual question of the amount of Petitioner's damages was never determined, but Petitioner alleged damages in the amount of $150,000. Taking this allegation of the

Complaint as true, the action of the Colorado courts has sustained Respondent's infliction of irreparable and permanent injury to Petitioner's land, and such action constitutes a compensable taking. *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1872). This conclusion is reached only via the prior proposition: that under Colorado law access is a property right.

Another factor to be considered is the extent of the diminution of the value of Petitioner's land. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Petitioner alleged values prior to and after the 1967 construction of $200,000 and $50,000, respectively. If these allegations are sustained, the property has decreased in value to one-fourth of the pre-traffic island figure. This is a question of fact which Petitioner should have been allowed to present. *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 Pac. 774 (1910); *U.S. v Pope & Talbot, Inc.*, 293 F.2d 822 (9 Cir. 1961). *Mahon* holds further that a state cannot cloak itself in the police power in the event of such a substantial diminution of value.

The decision of the Colorado Supreme Court in the present case is not in accord with the decisions of this Court in *Pumpelly v. Green Bay & Miss. Canal Co., supra*, and *Pennsylvania Coal Co. v. Mahon, supra*. In addition, Petitioner has not discovered a decision of this Court dealing with compensation for the destruction of access in the context of modern highway construction. The states vary in their approach to the subject. For instance, the Kansas Court is in accord with Colorado. *Brock v. State Highway Commission*, 195 Kan. 361, 404 P.2d 934 (1965). California and Massachusetts are examples of the opposite position. *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1944); *Nichols v. Commonwealth*, 331 Mass. 581, 121 N.E.2d 56 (1954). These conflicting positions on a sub-

stantial question of federal constitutional law provide a sound basis for this Court to grant certiorari in this case.

Respectfully submitted,
George B. Rice
Attorney for the Petitioner,
Member of the Bar of the
Supreme Court of the United States
2346 First National Bank Building
Denver, Colorado 80202
David J. Hahn,
C. Thomas Bastien,
Attorneys for the Petitioner

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF COLORADO

No. 23605

ROBERT HAYUTIN,

Plaintiff in Error,

v.

COLORADO STATE DEPARTMENT
OF HIGHWAYS,

Defendant in Error.

Error to the District Court
of the County of Arapahoe
Hon. Robert B. Lee, Judge

EN BANC JUDGMENT AFFIRMED

Wallace & Hahn
David J. Hahn
Attorneys for Plaintiff in Error
Duke W. Dunbar, Attorney General
Joseph M. Montano, Assistant Attorney General
Marlin D. Opperman, Assistant Attorney General
Attorneys for Defendant in Error

MR. JUSTICE DAY delivered the opinion of the Court.

Plaintiff in Error (plaintiff below), Robert Hayutin, argues in this appeal that he is entitled to damages from the Colorado State Highway Department for the taking of cer-

tain property. The facts relevant to our disposition of this appeal are, briefly, as follows:

Hayutin became the owner of a parcel of land located in the northeast quadrant of the intersection of Havana Street and Parker Road in Arapahoe County, Colorado, in 1956. Plaintiff's remote predecessor in title executed an agreement with the State of Colorado in 1955 about six months earlier conveying for right-of-way purposes a strip of land along the westerly portion of the property. The 1955 agreement also stipulated that access to plaintiff's property was to be provided through three forty-foot openings (or "curb cuts") in the conveyed right-of-way.

In 1955, prior to the date the plaintiff acquired the property, the state improved and widened Havana Street and Parker Road. This project, completed in 1956, involved the construction of raised medians in the middle of these streets. The median on Havana was not constructed directly in front of plaintiff's land, but north thereof. The median on Parker Road was constructed partially in front of plaintiff's property.

After the highway's improvement of 1955-1956, access into the property was possible by left turn movements for south bound and east bound traffic and by right turn movements for north and west bound traffic. Access out of the property could be accomplished by making right and left turn movements from the north curb cut and right turn movements only from the other two curb cuts.

In 1967, the Highway Department altered the intersection by extending the median strips and constructing islands to channelize all right turn movements at both the southwest and northeast quadrants. An island in the northeast quadrant was constructed on public right-of-way directly in front of and across from the north curb cut of plaintiff's property.

A lane exclusively for right turn traffic movements was constructed between the plaintiff's property and the island. By such construction all left turns for south bound or east bound traffic were prohibited and north bound traffic likewise cannot make a right turn directly into the property. By circuitous routing toward the east traffic may return in a westerly direction and gain access off the right turn lane through all three curb cuts. Exit from the property is by right turn only also from all three cuts.

Following trial to the court, judgment was entered denying plaintiff's claim for relief. The court held, *inter alia,* that:

> "For the types of injury or damage of which plaintiff complains, that is, those caused by the inconvenience of a circuitous route and diversion of traffic, the Court concludes there can be no recovery as a matter of law and that the claim for damages as alleged in plaintiff's complaint is damnum absque injuria and as such is not compensable * * *."

We agree and therefore affirm the holding of the court below.

I.

Plaintiff's first argument is that the intent of the agreement executed by his remote grantor, Near, and the state in 1955 was that the land acquired by the state would not be used to in any way limit or interfere with accessibility to the remainder of the property. We find this contention to be without merit. In our opinion, the language of the agreement is clear: It calls for a transfer of a strip of land to the state for right of way purposes and provides for three 40-foot openings in the boundary line thereof. These openings, as

the evidence revealed, were provided and they have not in any way been disturbed or interfered with. Plaintiff, we submit, is attempting to place upon the terms of the contract something which cannot be found from an analysis of the language within the four corners thereof. Where the contract is not ambiguous, and we believe that in this case it is not, it cannot be varied by parol evidence. *Thompson v. Sweet*, 91 Colo. 522, 19 P.2d 308 (1932). *See also Sentinel Acceptance Corporation v. Colgate*, 162 Colo. 64, 424 P.2d 380 (1967). While parol evidence may certainly be admitted to explain an agreement, *Von Riesen v. Greeley Finance Co.*, 142 Colo. 210, 350 P.2d 340 (1960), the explanation which the plaintiff seeks to give here is entirely inconsistent with the language in the agreement. What plaintiff is attempting to do is not to explain, but to give the agreement an entirely different meaning.

II.

Plaintiff next alleges that the law imposes a duty upon the state, at the time it acquires property, to fully advise property owners of the nature of the taking of their property, and here there was sufficient evidence to establish estoppel and to establish actionable misrepresentation and concealment. The lower court held on this point that the plaintiff had failed to establish events giving rights to an estoppel and that the evidence presented was insufficient to support plaintiff's allegations of misrepresentation and concealment concerning the Highway Department's development plans as related to plaintiff's property. We agree.

The evidence is clear that there was no misrepresentation to anyone, not even to Mr. Near from whom the land was purchased. In 1955 and 1956, the project for which the land was acquired was to improve the intersection of Parker Road and Havana Street. There has been no allegation or

statement that the Highway Department misrepresented anything to Mr. Near at that time. It is only when some 11 to 12 years later the intersection was again improved that allegations of misrepresentation are asserted.

Inasmuch as the Highway Department did not design the 1967 construction until early that year, it seems implausible to assert that the Highway Department deliberately misrepresented in 1955 that which the evidence establishes it did not know until 1967.

III.

Plaintiff's last argument is that the admitted acts of the state restricting ingress to and egress from his property constituted a taking or damaging of his property without just compensation within the meaning of Colo. Const. art II, § 15, which provides: "Private property shall not be taken or damaged, for public or private use, without just compensation. * * *" Recent pronouncements by this court in the cases of *Thornton v. City of Colorado Springs*, ___ Colo. ___, 478 P.2d 665 (1970); *Majestic Heights Co. v. Board of County Commissioners of Jefferson County*, ___ Colo. ___, 476 P.2d 745 (1970), all announced subsequent to the filing of briefs in the instant case, have enunciated the rule that mere circuitry of route will not allow recovery for damage of property.

A situation factually similar to the case now before us was presented in *Thornton v. City of Colorado Springs, supra.* In *Thornton,* abutting landowners attempted to enjoin the construction of a solid median strip dividing the street, and thus restricting access to their property:

> "In the instant case, plaintiffs introduced evidence that would indicate that if the solid median strip were allowed to remain, persons wishing to

> reach the property in question would have to drive to openings or cuts in the strip at places past their land and not immediately adjacent to it. We have consistently held that: 'Mere circuity of route necessary for access [sic] or egress occasioned by a public improvement are not compensable items of damage.' *Troiano v. Colorado Department of Highways,* 170 Colo. 484, 463 P.2d 448 (1969)." *See also Majestic Heights v. Board of County Commissioners of Jefferson County, supra; Radinsky v. Denver,* 159 Colo. 134, 410 P.2d 644 (1966); *Gayton v. Department of Highways,* 149 Colo. 72, 367 P.2d 899 (1962).

The court below correctly held that the placement of the median strips and the construction of the traffic islands are within the police power of the state; that the access available to the property is still reasonable and has not been substantially impaired; and that reasonable access can be gained from the property into the general street system and from the general street system into the property. The resulting traffic pattern is only slightly different from that generally prevailing in the metro area where solid median strips and signs prohibiting left turns abound to regulate traffic on main arterial highways such as Havana and Parker Road.

> "Where, however, there is mere inconvenience resulting from a more circuitous route and from diversion of traffic, diminution of value is not compensable." *Thornton v. City of Colorado Springs, supra.* (Emphasis added.)

The inconvenience complained of by plaintiff is one which results from being forced to travel a longer distance in going to and from portions of the public highways to the property and of traffic being diverted past his property. This

inconvenience is one which results from traveling a circuitous route and is the same type of inconvenience suffered by many members of the general public who have occasion to use Havana Street or Parker Road. This kind of inconvenience is merely different in degree, not in kind, from that sustained by the general public, and as such is not compensable.

> "In order to be entitled to recover for any damage caused by this modification, Majestic must show that the damages to it are different in kind not merely in degree from the damages sustained by the general public; particularly here it must show that its right of access to and from the general street system was substantially impaired, not merely inconvenienced, by the modification." *Majestic Heights v. Board of County Commissioners, supra. See Troiano v. Department of Highways, supra; Radinsky v. City and County of Denver, supra; Gayton v. Department of Highways, supra; Denver Union Terminal Ry. v. Glodt,* 67 Colo. 155, 186 P. 904 (1919).

The judgment of the court below is affirmed in all respects.

MR. JUSTICE LEE not participating.

APPENDIX B

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF ARAPAHOE AND
STATE OF COLORADO

Civil Action No. 25746

ROBERT HAYUTIN,

Plaintiff,

VS.

COLORADO STATE DEPARTMENT
OF HIGHWAYS,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

THIS CAUSE came on for trial to the Court on October 16, 1967 upon the first three claims for relief set forth in plaintiff's complaint. Plaintiff's complaint contains five claims for relief, the latter two of which relate to claim for compensation for damages to plaintiff's property by reason of the alleged taking thereof by defendant. Plaintiff's first claim for relief seeks a declaratory judgment construing a contract between plaintiff's predecessor in interest and defendant highway department; plaintiff's second claim for relief seeks to estop defendant from denying the exisence of easements therein asserted; plaintiff's third claim for relief asks for cancellation of the deed from plaintiff's predecessor in interest conveying certain right-of-way property to defendant highway department.

The Court having heard and considered the testimony and evidence presented, the arguments of counsel and writ-

ten briefs of plaintiff and defendant and being fully advised in the premises hereby FINDS as follows:

1. At all times pertinent to this case and since March, 1956, the plaintiff has been and is the owner of a tract of land situate in Arapahoe County, described as follows:

> "Beginning at a point on the North line of the Southwest Quarter (SW/4) of the Southwest Quarter (SW/4), Section 26, Township 4 South, Range 67 West of the 6th Principal Meridian 56' East of the Northwest Corner of the Southwest Quarter (SW/4) of the Southwest Quarter (SW/4) of said Section 26, thence East 1257.05' to the East line of the Southwest Quarter (SW/4) of the Southwest Quarter (SW/4) of said Section 26, thence South along said East line 408.55', thence West 972.25' to the Northerly right-of-way line of State Highway No. 83, thence Northwesterly along said right-of-way line 412.09' to the East line of South Havana Street, thence North along said East line 109.93' to the point of beginning. Containing 10.814 acres of land more or less, Arapahoe County, Colorado, less that parcel of land described and deeded in Book 938, Page 470 of the Arapahoe County records.

2. That the tract or parcel of land described in paragraph 1 above is located in the Northeast quadrant of the intersection of Havana Street and Parker Road. The tract is bound on the west by Havana and on the south by Parker Road.

3. That plaintiff's remote predecessor in title did on October 7, 1955, convey to the defendant a strip of land for highway right-of-way purposes, which strip of land was an integral part of the property owned by plaintiff's predeces-

sor, constituting the westerly portion thereof, which strip of land conveyed to defendant now abuts plaintiff's property on the westerly side thereof.

4. That the acquisition by defendant of the strip or parcel of land hereinabove mentioned in paragraph 3 was for the purpose of improving and widening Havana Street and Parker Road.

5. That in the sales and purchase agreement between the defendant and plaintiff's remote predecessor in title there were reserved three openings, 40 feet wide, in the right-of-way line, which said right-of-way line is the same as the present property line of the plaintiff. One opening was to be at the North property line, the second at the South property line, and the third approximately 225 feet westerly of the southerly property line.

6. That in 1955 and prior to the date that the plaintiff acquired the property, the defendant improved and widened Havana Street and Parker Road. This project was completed in 1956. As a part of this project, the defendant constructed raised medians in the middle of Havana Street and Parker Road. The most southerly portion of the median in Havana, north of the intersection, was at a point north of the North property line, i.e., the median was not constructed directly in front of plaintiff's land but north thereof. The median on Parker Road was constructed partially in front of plaintiff's property. Raised channelizing islands for right turn movements were constructed in the Northwest and Southeast quadrant of the intersection.

7. After the highway's improvement of 1955-1956, access into the property was as follows: For traffic traveling south on Havana, left turn movements could be made into the property via the North opening; for traffic traveling north on Havana, a right turn movement could be made into

the property via the North opening; for traffic traveling on Parker Road in an easterly direction, a left turn could be made into the property via the North opening; for traffic traveling in a westerly direction on Parker Road, right turn movements could be made into the property via all three openings. Access out of the property could be accomplished by making right and left turn movements from the opening at the North and right turn movements only from the other two openings.

8. In 1967, the defendant, without the need of acquiring additional right-of-way again improved the intersection of Havana Street and Parker Road. The median strips were extended and in addition raised channelizing islands for right turn movements were constructed in the Southwest and Northeast quadrants of the intersection. An island in the Northeast quadrant was constructed on public right-of-way but directly in front of and across from the North opening of plaintiff's property. A lane for right turn traffic movements was constructed between the plaintiff's property and the island.

9. The access into the property after the 1967 construction was as follows: For traffic traveling in a southerly direction on Havana, which before could make a left turn via the North opening, now has to travel to the middle of the intersection, make a left turn on Parker Road, and travel from three-tenths to nine-tenths of a mile, depending on varying traffic conditions, and then retrace its movements and return on the North side of the Parker Road, from which road movements could be made into the property via all three openings; for traffic traveling in an easterly direction on Parker Road, which before could make a left turn into the property via the North opening, now has to travel three-tenths to nine-tenths of a mile beyond the intersection and return on the right side on Parker Road, from which right side of road entrance to the prop-

erty can be gained via all three openings. For traffic traveling north on Havana in a northerly direction, the right turn movement into the property via the North opening is not now available because of the construction of the island. Instead, a right turn would have to be made at the intersection and again traffic would have to move three-tenths to nine-tenths of a mile and return on the right side of Parker Road, from which road access can be gained into the property via all three openings. For traffic traveling on Parker Road in a westerly direction, a right turn can be made via all three openings as before.

CONCLUSIONS OF LAW

1. The Court concludes that the agreement between the defendant and plaintiff's remote grantor and predecessor in interest reserved three openings in the right-of-way line or property line as access easements to plaintiff's property but that the same *did not* reserve to the owner of the abutting property easements in the right-of-way of the road, as claimed and prayed for in plaintiff's first claim for relief.

2. The Court concludes that plaintiff has failed to establish rights to an estoppel by which defendant is estopped to deny plaintiff the easements claimed within the right-of-way of the road as set forth in plaintiff's second claim for relief.

3. The Court concludes that the evidence is insufficient to support plaintiff's allegations of misrepresentation and concealment concerning defendant's highway development plans as related to plaintiff's property and as set forth in plaintiff's third claim for relief.

4. The Court finds that the extension of the median in Havana and Parker Road and the construction of the traffic islands restricting the flow of traffic movements in and out of the plaintiff's property do not constitute a taking nor a damaging of private property so as to entitle the plaintiff to

compensation by virtue of the 1967 highway construction. The Court finds that the placing of the median strips and the construction of the traffic islands is within the police power of the state; that the access available to the property is still reasonable and has not been substantially impaired; that reasonable access can be gained from the property into the general street system and from the general street system into the property; that the injury of which plaintiff complains consists of inconvenience in being forced to travel a longer distance in going to and from portions of the public highways to the property and of traffic being diverted past his property. The inconvenience is one which results from traveling a circuitous route and is the same type of inconvenience suffered by many members of the general public who have occasion to use Havana Street and Parker Road. The plaintiff's inconvenience is merely different in degree, not in kind, from that sustained by the general public. Further, the Court concludes that the plaintiff has no right to the continued flow of traffic in front of his property. For the types of injury or damage of which plaintiff complains, that is, those caused by the inconvenience of a circuitous route and diversion of traffic, the Court concludes there can be no recovery as a matter of law and that the claim for damages as alleged in plaintiff's complaint is damnum absque injuria and as such is not compensable; that the plaintiff is not entitled to the relief prayed for in plaintiff's complaint.

It is, therefore, ORDERED, ADJUDGED AND DECREED that each of plaintiff's claims for relief herein be and the same are hereby denied. Plaintiff shall have 30 days in which to file motion for a new trial.

DONE AND SIGNED in open Court this 29th day of March, A.D. 1968.

BY THE COURT:
Robert B. Lee
Judge

APPENDIX C

Clerk's Office

SUPREME COURT

State of Colorado
Denver, 80203
June 28, 1971

CASE NO. 23605

HAYUTIN

v.

COLORADO STATE HIGHWAY DEPT.

The Honorable Duke W. Dunbar,
Attorney General,
Mr. John P. Moore,
Deputy Attorney General
State Capitol,
Denver, Colorado. 80203.

Mr. Joseph M. Montano,
Chief Highway Counsel,
Mr. Marlin D. Opperman,
Asst. Attorney General,
4201 E. Arkansas Avenue.
Denver, Colorado. 80222.

Messrs. Wallace & Hahn,
Mr. David J. Hahn,
Attorneys and Counselors,
2346 First National Bank Building,
Denver, Colorado. 80202.

Gentlemen:

The following proceedings were this day had in the above numbered and titled case:

The petition for rehearing was denied.
Remittitur issued.

Yours very truly,
RICHARD D. TURELLI, Clerk.
By Florence Walsh

Deputy Clerk.

APPENDIX D